No. 06-407

In The
Supreme Court of the United States

MICHAEL SAVILLE,

Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARTIN D. LITT
(Counsel of Record)
SVEN C. COLLINS
HOLME ROBERTS & OWEN LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
(303) 861-7000 Fax: (303) 866-0200

Attorneys for Respondent International Business Machines Corporation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent International Business Machines Corporation ("IBM") states that it does not have a parent corporation and there is no publicly held corporation that owns ten percent (10%) or more of its stock.

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STATEMENT OF THE CASE

International Business Machines Corp. ("IBM") submits the following limited correction and supplementation to petitioner Michael Saville's ("Saville") Statement of the Case set forth in his Petition for Writ of *Certiorari* ("Petition").

Saville's summary of the District Court's Order & Opinion granting IBM summary judgment on his sole claim for retaliation in violation of the Fair Labor Standards Act ("FLSA") is incomplete. The District Court ruled that Saville had failed to present evidence necessary to raise a genuine dispute of fact on all three elements of his *prima facie* case for his claim of retaliation. The District Court found that: (1) Saville did not engage in protected activity under Section 215(a)(3) of the FLSA (App. 16-18); (2) IBM did not constructively discharge Saville (App. 18-20); and (3) regardless of the outcome on the first two elements, Saville could not show a causal connection between his alleged protected activity and IBM's alleged adverse employment action (App. 21-22).

Further, employing this Court's burden-shifting framework under *McDonnell Douglas Corp. v. Green*, 441 U.S. 792 (1973), the District Court found that, in addition to failing to make out a *prima facie* case of retaliation, Saville could not satisfy his burden of establishing that IBM's legitimate non-retaliatory reasons for the alleged adverse employment action were pretextual. App. 22-25.

Saville has petitioned for *certiorari* to obtain review of the Tenth Circuit's decision based on the false premises that the Circuit courts are divided or split on the legal standard for determining constructive discharge and that the lower courts, particularly the Tenth Circuit, need this

Court's guidance in deciding whether constructive discharge constitutes materially adverse employment action. Both of these contentions are incorrect, as the very Supreme Court and Circuit court cases that Saville relies upon in his Petition show. In particular, *Burlington No. & Santa Fe RR Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), a Title VII case, does not create a conflict with prior Supreme Court or Circuit court jurisprudence on constructive discharge, nor does it call into question the Tenth Circuit's ruling in this FLSA case that Saville failed to show that his voluntary decision to retire did not amount to a constructive discharge.

STATEMENT OF FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED[1]

A. Saville's job with IBM required strong mentoring, teamwork, and customer service skills.

1. Saville was employed with IBM from 1966 until his retirement on October 30, 1998. Aplt. App. at 54 [10:7-11] & 129 [631:22-632:8]. From 1996 through 1998, he was a Customer Engineer ("CE"). *Id.* at 11 [¶ 10]. Saville was the second highest level CE and the most senior in his group. *Id.* at 139 [¶ 3].

2. As a CE, Saville was responsible for maintaining IBM equipment at customer locations, serving as a technical resource for customers, managing customer accounts in

[1] Because Saville's Statement of Facts Relevant to the Issues Presented for Review violates Sup. Ct. R. 24(1)(g) by failing to cite to the appendices and offers certain unsupportable factual statements, IBM offers its own Statement of Facts with citation to the appendices.

a cost-efficient manner, and influencing customers to purchase additional IBM products and services. Aplt. App. at 85-86 [366:18-367:8, 368:13-18], 139-140 [¶ 4] & 275-277. There were three general functions to Saville's job. First, there was the technical function of being able to install and maintain IBM equipment for customers. Saville had the skills and technological knowledge necessary for the job. Aplt. App. at 139-140 [¶ 4].

3. The second key aspect of the CE job was "developing positive relationships with customer management and staff to ensure a high level of overall customer satisfaction in all assigned accounts." Aplt. App. at 140 [¶ 5]; Aplee. Supp. App. at 163.

4. The third key part of Saville's senior-level CE position was mentoring and training the less experienced CEs in the group. Aplt. App. at 56 [83:23-84:10] & 140 [¶ 6]. It was important that he develop and maintain good working relationships with his peers so that they would feel comfortable coming to him to draw upon his valuable knowledge and skills. *Id.*

5. Good interpersonal skills, for customer and peer relations, were essential to Saville's job performance. Aplt. App. at 140 [¶ 7]. Saville was to "establish and maintain positive work relationships with peers, management, and customers[,] displaying willingness to understand diverse points of view." *Id.*; Aplee. Supp. App. at 165. Furthermore, he was required to manage his customer accounts in a cost-efficient manner, which included managing his time and expenses efficiently. Aplt. App. at 64 [177:24-178:8, 180:2-5] & 141 [¶ 8].

B. Saville's job performance, particularly in the area of customer and peer relations, declined and his attitude became increasingly negative during his final years with IBM prior to retirement.

6. As early as 1995, Saville's managers began to note problems with the manner in which he interacted with others. In Saville's annual performance review (known as a "Personal Business Commitment" or "PBC") for 1995, his manager at the time stated:

> [M]ore is expected in his relationships and the way he communicates with others. This has lead [sic] some people to not want to use him in his specialist capacity or as a peer. Mike at times comes across negative and adversarial causing some people to not want to deal with him.

Aplt. App. at 57 [99:21-100:25]; Aplee. Supp. App. at 171 [Dep. Ex. 3]. Saville received the lowest of three possible ratings, "More is expected." *Id.*

7. Saville's problems in mentoring and relating to his peers continued in 1996, as reflected in his 1996 PBC:

> Mike . . . has a hard time to mentor others because a lot of them prefers [sic] not to work with him. . . . Mike should continue to work on his relationships with his peers.

Aplee. Supp. App. at 179 [Dep. Ex. 4]; Aplt. App. at 58 [103:17-104:3]. Saville admitted, in relation to the 1996 PBC, that there were two individuals in his work group who had chosen not to work with him. Aplt. App. at 60 [116:6-14]. Indeed, Saville admits that he "was not a perfect employee" and he received performance evaluations where managers "encourag[ed] him to work on his relationships with his peers." Petition, at 5 ¶ 10.

8. Vickie Fullmer supervised Saville from January 1997 through the approximate year and a half prior to his retirement. Aplt. App. at 139 [¶ 2]. When she took over as Saville's supervisor, Ms. Fullmer had the impression that Saville had a history of problems with his interpersonal relations. *Id.* at 141 [¶ 9]. Nonetheless, she gave him a clean slate, hoping that he would correct these problems. Aplt. App. at 141 [¶ 9]. During his first year under Ms. Fullmer's supervision, Saville performed well technically, but several of his co-workers complained to Ms. Fullmer that they were uncomfortable asking him for technical assistance because he would often handle the situation in a demoralizing manner and he would talk down to them. *Id.* [¶ 10].

9. Ms. Fullmer met with Saville and told him that his peers' perception was that he was not easily approachable. She explained that, as his job required him to be a resource and a mentor, he would need to improve this aspect of his performance. Aplt. App. at 141 [¶ 10]. For example, in a November 1997 e-mail to him she stated:

> Mike, you are a very talented SSR. Don't loose [sic] sight of that. *We need to keep working on your interactions with others and the perception that has been created over the years.* I continue to support you and take your name forward in a very positive light. . . .

Aplee. Supp. App. at 181 [Dep. Ex. 7] (emphasis added).

10. As part of its annual PBC (performance review) process, IBM solicited comments from each employee's peers. Aplt. App. at 87 [385:18-21] & 141 [¶ 11]. This was known as "360 Degree Feedback." *Id.* In the 360 Degree Feedback evaluation of Saville's 1997 performance, his

peers made the following comments reflecting Saville's poor relations with them and with customers:

- I know Mike is trying harder to have better "bedside manners" and I think he will accomplish the task. His customer relations is [sic] sometimes strained because of what he says. Mike has this problem with his peers too. . . .
- A possible point for improvement might be for Mike to be a little less forceful when working with customers when he tries to have them understand his approach with certain projects. . . .
- Mike works to [sic] many hours and it makes him grouchy.

Aplee. Supp. App. at 182-183; Aplt. App. at 141 [¶ 11].

11. Even though Saville needed further improvement in his team building, customer relations, mentoring and interpersonal skills, Ms. Fullmer rated him as having "Achieved Commitments" on his 1997 PBC, because she had seen some improvement in these areas and he had valuable technical abilities. Aplt. App. at 142 [¶ 12]. Ms. Fullmer also thought that Saville seemed to be acknowledging his problems, as he admitted that he was "a bit cranky according to [his] peers," that he would "work on it," and that he had "no problem changing and underst[ood] the importance." Aplee. Supp. App. at 187. In the 1997 PBC, Ms. Fullmer praised Saville for the efforts he had made, but put him on notice that he needed to continue to work on his relationship skills, hoping that this would encourage Saville to correct his performance deficiencies. Aplt. App. at 142 [¶ 12]. Ms. Fullmer specified

in the 1997 PBC that "Committment [sic] and long term results will assist in overcoming some of the remaining barriers." Aplee. Supp. App. at 188.

12. Saville's performance problems in the key areas of his customer and peer relations unfortunately did not improve in 1998, as Ms. Fullmer had hoped. Aplt. App. at 142 [¶ 13]. Saville's attitude seemed to have soured. In department meetings, he would make negative comments about IBM and his department. *Id.* [¶ 14]. Saville admits that he was unhappy and had a negative attitude. *Id.* at 94 [431:4-13, 432:3-434:6]; Aplee. Supp. App. at 192.

13. Ms. Fullmer also became seriously concerned about Saville's customer relations. In June 1998, one of IBM's customers, Orem City, complained to Ms. Fullmer about Saville. *Id.* at 142 [¶ 15]. The customer representative, Clarke Christensen, submitted a declaration on summary judgment stating that Mr. Saville "was obnoxious and acted inappropriately in his dealings with me and the other Orem City employees. . . ." Aplt. App. at 205 [¶ 3]. Mr. Christensen complained to Ms. Fullmer that Saville would belittle the customer's system operators and programmers working on the project and asked that Saville be removed from the project. *Id.* at 205-206 [¶ 3], 142 [¶ 15] & 102-103 [491:8-16, 494:25-495:7]; Aplee. Supp. App. at 196 [Dep. Ex. 27].

14. Ms. Fullmer also continued to hear complaints from Saville's peers that they found him difficult to work with and unapproachable because he made them feel stupid, that he had a negative attitude, and that he did not display leadership. Aplt. App. 142 [¶ 16].

C. Ms. Fuller gave Saville an interim PBC lowering his performance rating.

15. Because Ms. Fullmer believed that Saville's performance was headed in the wrong direction and was unacceptable, she decided to give him an interim PBC review. Aplt. App. at 143 [¶ 17]. An interim review is a way to tell employees that they are trending toward a low performance rating with the hope that they will correct their performance before the end-of-the-year review. *Id.*

16. In July 1998, Ms. Fullmer met with Saville to discuss his continuing performance problems and to tell him that he was being reviewed on an interim basis. Aplt. App. at 87 [383:21-23] & 143 [¶ 18]. She told him his performance rating was headed downward and, at that time, was a whole level below what he had been rated for 1997. *Id.* at 88 [394:5-7] & 143 [¶ 18]. Ms. Fullmer's assessment was based on Saville's negative attitude, lack of leadership, continued problems dealing with his peers and customers, and failure to show adequate support for Ms. Fullmer. *See* Aplt. App. at 88 [392:4-393:17] & 143 [¶ 18]. The interim PBC was essentially a wakeup call that Saville needed to improve his performance before the end of the year or his rating would suffer. Aplt. App. at 143 [¶ 19].

17. Saville thought that his interim PBC was unfair and submitted an anonymous e-mail complaint to IBM human resources under IBM's "Speak Up" program. *See id.* at 91 [412:9-18, 413:2-9]; Aplee. Supp. App. at 192 [Dep. Ex. 25]. The "Speak Up" program allows employees to raise issues, complaints or concerns anonymously with human resources personnel. Aplt. App. at 147 [¶ 3].

18. Saville stated in his Speak Up complaint that he thought Ms. Fullmer gave him the interim PBC in reaction to an allegedly negative employee opinion survey that she had received about her effectiveness as a manager. *See* Aplee. Supp. App. 192-193; Petition, at 8-9, ¶ 24. Saville also acknowledged in his Speak Up complaint that he had an attitude problem, saying "I think I do have an attitude problem as a result of some of my manager's action and lack of action and the meeting today certainly reinforced my attitude in a negative direction." *See* Aplee. Supp. App. at 192.

19. On July 17, 1998, Saville had a follow-up telephone conference regarding his Speak Up with an IBM Human Resources officer, Pat Pye. Aplt. App. at 92 [418:11-13]. Saville discussed, among other things, that some of his unspecified peers, at unspecified times, might be working overtime but not recording it. *Id.* at 95 [447:23-448:1]. Saville also raised his concerns with Ms. Fullmer's interim PBC. *Id.* at 93 [428:24-429:1]. Ms. Pye suggested that Saville discuss his concerns with Brian Myers, his Second-Line Manager to whom Ms. Fullmer reported. *See* Aplee. Supp. App. at 194.

20. On September 1, 1998, Saville met with Mr. Myers to discuss his concerns. Aplt. App. at 98 [474:23-24]. Saville told Mr. Myers that unspecified CEs were grumbling about working overtime but not recording it, due to IBM's micromanagement of overtime. *Id.* at 106-107 [510:20-511:5]. Saville told Mr. Myers that he thought Ms. Fullmer was not properly managing her group. *See* Aplt. App. at 148 [¶ 5]; Petition, at 11, ¶ 38. Mr. Myers also took the occasion to express his concern that Saville reportedly had been removed from several customer accounts. Aplt. App. at 101 [484:18-21] & 148 [¶ 6]. Saville admitted that

he had been taken off the Orem City account at the customer's behest. *Id.* at 148 [¶ 6]; Aplee. Supp. App. at 196.

21. Mr. Myers told Saville that he would investigate Saville's concerns by interviewing other members of his work group. Aplt. App. at 103 [495:8-15].

22. After his September 1, 1998 meeting with Saville, Mr. Myers investigated Saville's concerns by interviewing three members of his group. He concluded that Saville's concerns were without merit and, instead, that Saville had serious communication problems with Ms. Fullmer and Customer Engineers. Aplt. App. at 148 [¶ 7].

D. Based on continuing problems with Saville's performance, Ms. Fullmer decided to give him a choice of going on an improvement plan or retiring from IBM with severance benefits.

23. Ms. Fullmer continued to see problems with Saville's performance following the interim PBC. Aplt. App. at 143 [¶ 20]. For example, during a September meeting of the CEs under her supervision, Saville interrupted her and made several comments that she perceived as undermining her authority and denigrating IBM. *Id.* Ms. Fullmer perceived his comments as suggesting that IBM did not value its people and that the CE group should look for jobs elsewhere. *Id.* She understood his other comments to suggest that IBM management did not know what it was doing, but that he did because he had been with the company for 32 years. *Id.*

24. Additionally, another customer to whom Saville had been assigned told Ms. Fullmer that it was dissatisfied with his service and demanded that IBM replace him

with another CE. Aplt. App. at 143-144 [¶ 21] & 110-111 [530:15-531:25].

25. Ms. Fullmer decided that her softer approach was not working and that Saville needed a stronger message. *Id.* at 144 [¶ 22]. She met with her manager, Mr. Myers, in late September 1998 and explained that she was not getting results from informal efforts to improve Saville's performance. She told him she was experiencing more and more problems with Saville and that she had, therefore, decided to put Saville on a formal performance improvement plan. *Id.* Mr. Myers also suggested offering Saville the alternative option of a severance package if he were unwilling to go on the performance improvement plan. Ms. Fullmer agreed with this approach. *Id.*

26. Mr. Myers already had a meeting scheduled with Saville so he anticipated explaining the options to Saville in general terms, but expected Ms. Fullmer would provide details in a follow-up meeting. Aplt. App. 144 [¶ 23].

E. Saville voluntarily chooses to retire instead of continuing his employment on a performance improvement plan.

27. Mr. Myers met with Saville on September 30, 1998. Aplt. App. at 149 [¶ 10]. Mr. Myers reported that his interviews with Mr. Saville's peers had not confirmed Saville's complaints that Ms. Fullmer was the problem. Mr. Myers said that the interviews had instead revealed that Saville had serious performance problems. *Id.* Mr. Myers told Saville that his attitude, leadership, mentoring and support for Ms. Fullmer were unacceptable and that his attitude problem was causing customer complaints. *Id.* at 149 [¶ 11] & 115 [565:19-25]. Mr. Myers also told Saville

that he was very concerned with the customer complaints. *Id.* at 149 [¶ 11]. Such customer complaints were unacceptable from a leadership point of view. *Id.*

28. Saville responded, in part, by admitting that he had a negative attitude, but blamed it on how he felt he had been treated by management. Aplt. App. at 116 [567:7-568:2]. Mr. Myers told Saville that his job required him to step up to his leadership role and provide the necessary mentoring to employees who were less experienced. *Id.* at 149 [¶ 11]. Mr. Myers explained that Saville needed to make an effort to turn things around and that the changes had to be made now. *Id.* Mr. Myers then explained that Saville would have the option of going on a performance improvement plan or retiring from IBM with a severance package. Aplt. App. at 149 [¶ 12] & 118 [580:6-24]. He concluded the conversation by saying that Ms. Fullmer would provide further details regarding the options. *Id.* at 149 [¶ 12] & 119 [583:8-11].

29. On October 5, 1998, Ms. Fullmer met with Saville and laid out his options in more detail. *Id.* at 119 [586:12-14]. She told him that he had fallen short of his job expectations and could go on a thirty-day improvement plan to correct his problems with performance, leadership, support of his peers, support of management, team work and customer satisfaction. *Id.* at 120, 123 [588:12-18, 601:20-25] & 144 [¶ 24]. Alternatively, Saville could voluntarily retire from IBM with a severance package. *Id.* at 121-122 [594:21-595:3]. Ms. Fullmer told Saville that he had 30 days to decide. *Id.* at 123 [601:7-10].

30. A performance improvement plan does not automatically result in termination. Aplt. App. at 145 [¶ 25] & 149-150 [¶ 13]. It is a real opportunity for an

employee to correct deficient performance and avoid termination. *Id.* In fact, Mr. Myers had experience with employees successfully completing performance improvement plans. *Id.* So did Saville: as an IBM manager, he had placed six different employees on improvement plans, all of whom succeeded. *Id.* at 126 [622:3-10].

31. Instead of pursuing the employment opportunities available to him at IBM, Saville rejected both of the options presented by Ms. Fullmer, and chose to retire and to receive benefits under IBM's Retirement Plan rather than severance benefits. Aplt. App. at 127 [625:7-19]; Aplee. Supp. App. at 198. He requested separation code "8J" from IBM human resources to take advantage of a particular retirement option. Aplt. App. at 127 [624:13-625:3] & 198 [¶ 3]. Saville retired from IBM on October 30, 1998. *Id.* at 129 [633:18-24].

F. Saville did not engage in protected activity under the FLSA.

32. In late 1997, Ms. Fullmer introduced an IBM directive to reduce the amount of overtime worked by CEs in an effort to control costs. Aplt. App. at 76 [275:1-4, 277:2-8]. Ms. Fullmer asked employees, including Saville, to try to limit overtime whenever possible and set a target limit of 10 percent overtime. *See* Aplt. App. at 61 [122:21-24] & 63 [169:13-25]. As Saville admits, this directive was lawful. *See* Aplt. App. at 64 [180:2-5] & 76 [276:16-277:8].

33. From the time the directive was announced, through early 1998, Saville and Ms. Fullmer had ongoing email discussions about how he could meet the directive. *See* Aplt. App. at 76 [275:5-277:8]. Ms. Fullmer responded to Saville's concerns by telling him to record his overtime

as "correctly and as accurately and timely as possible." *Id.* at 77 [281:2-14] & Aplee. Supp. App. at 206. Indeed, Saville knew that he was to report his overtime, Aplt. App. at 67 [190:15-22], and he was paid for all overtime he worked, *id.* at 64 [179:13-15].

34. Saville contends that he complained to Ms. Fullmer that the overtime directive was "causing problems in morale on his team" and that he had "many verbal and e-mail discussions with Ms. Fullmer regarding monitoring and administering overtime." Petition, at 8, ¶ 18. This allegation is not supported by the record and does not indicate that Saville was voicing complaints about overtime violations to Ms. Fullmer. Moreover, Saville admitted that he never complained to Ms. Fullmer that he believed IBM was violating the overtime laws. *See* Aplt. App. at 108-109 [521:3-20, 523:17-524:12] (stating that the only complaints Saville allegedly made about overtime were to Ms. Pye and Mr. Myers). Saville never told Ms. Fullmer that he thought her emails to him regarding overtime were inappropriate. Aplt. App. at 84 [359:9-13]. Indeed, during oral argument in the District Court on IBM's motion for summary judgment, Saville's counsel conceded that Saville's dialogue with Ms. Fullmer about overtime "probably is not considered protected activity." *Id.* at 223 [lines 1-7, 13-14 & 23-24].

35. The only evidence of alleged overtime complaints that Saville proffered to the District Court were the concerns that he raised with Ms. Pye and Mr. Myers, discussed *supra* at ¶¶ 19, 20. Aplt. App. at 108-109 [521:3-20, 523:17-524:12]. He told Ms. Pye, during their July 17, 1998 Speak Up telephone conference, and later Mr. Myers during their September 1, 1998 meeting, that several unspecified CEs were grumbling because they were

working overtime and not recording it because of the way IBM was "micromanaging" overtime. Aplt. App. at 101 [485:6-12] & 106-107 [510:13-511:5].

36. As Saville readily admits, Ms. Fullmer had no knowledge of his alleged complaints about overtime practices to Ms. Pye or to Mr. Myers, or that he had made his Speak Up complaint. Aplt. App. at 113 [541:5-542:12] & 145 [¶ 27].

37. Saville speculates that Ms. Pye and Ms. Myers must have told Ms. Fullmer about his peers' grumblings about overtime. Aplee. Supp. App. at 50-51 [¶ 39]. Saville, however, proffered no evidence to support his conspiracy theory. *See id. See also* Aplt. App. at 359 (finding that the record is devoid of any evidence of communications between Ms. Fullmer, Ms. Pye and Mr. Myers regarding Saville's alleged overtime complaints). Accordingly, the record was undisputed that Ms. Fullmer had no knowledge that Saville had raised any complaints about alleged illegal overtime practices before her decisions to give him an interim PBC lowering his performance rating or to place him on a performance improvement plan. Aplt. App. at 113 [541:5-542:12] & 145 [¶ 27].

38. Moreover, Ms. Fullmer's decisions to give Saville an interim PBC and then, when that did not work, to place him on a performance improvement plan were solely based on Saville's repeated failures to meet his job requirements. Aplt. App. at 145 [¶ 27]. Saville proffered no evidence to contradict these facts. Aplee. Supp. App. at 51 [¶ 40] & 88 [¶ 40].

ARGUMENT

I. The Supreme Court Should Deny Saville's Petition Because it Raises No Issues Warranting this Court's Review.

A. The Petition Presents No Circuit Split or Conflict with Supreme Court Precedent.

In his District Court and Tenth Circuit briefs, Saville alleged but one adverse employment action – constructive discharge – in support of his *prima facie* FLSA retaliation case. Aplee. Supp. App. at 57; App. 1-2, 5. He lost on that issue in the Tenth Circuit. Hence, in his Petition he now advances several arguments as to why this Court should address the issue of constructive discharge. Saville tries to create an issue worthy of *certiorari* by portraying the Circuit courts as divided or split on the legal standard for determining constructive discharge and argues that the lower courts, particularly the Tenth Circuit, need this Court's guidance in deciding whether constructive discharge constitutes materially adverse employment action. The cases that Saville cites in the Petition, however, show both of these contentions to be incorrect.

As discussed in detail below, the Circuit court cases that Saville holds up as examples of a purported conflict concerning the proof needed to show constructive discharge, in fact, reveal substantial harmony among the Circuits. Indeed, all Circuits, including the Tenth, apply the same standard that this Court announced in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), for evaluating whether a constructive discharge occurred.

Finally, the Tenth Circuit's decision in this action – that Saville failed to demonstrate constructive discharge, the sole basis he advanced to show adverse employment

action – is not inconsistent with any of this Court's decisions discussed in the Petition. In fact, it is plain from the Petition that those decisions are either inapposite and not controlling or were fully respected by the Tenth Circuit in its decision. For these reasons, the Petition does not present issues meriting this Court's review.

1. Saville's Second Presented Question Regarding the Standard of Proof for Constructive Discharge is Not Worthy of *Certiorari* Because There is No Conflict Among the Circuits on this Issue and it is Already the Settled Law of this Court.

Only with respect to his second presented question does Saville assert that there is a split of authority among the Circuits. His second presented question is whether proof of constructive discharge requires a showing that "an employer [made] working conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign." Petition, at 18. The answer, as both this Court and the Circuit courts uniformly hold, is yes.

In analyzing his second question presented, Saville tries to portray the Circuit courts as divided on the standard for constructive discharge. This is demonstrably false. Circuit splits occur where there is no Supreme Court precedent on an issue or there is some ambiguity as to how the precedent applies in particular contexts. Neither is the case here.

In *Suders*, the Supreme Court defined precisely the standard to be applied in claims of constructive discharge: "Did working conditions become so intolerable that a

reasonable person in the employee's position would have felt compelled to resign?" 542 U.S. at 141. The Courts of Appeals cases that Saville discusses in his Petition, at 19-20 – all of which pre-date *Suders* – are not in disagreement and uniformly apply the same standard ultimately adopted by this Court in *Suders* with formulations that are substantively identical, as set forth in following chart:

Circuit Court Decision	**Test for Constructive Discharge**
Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 28 (1st Cir. 2002)	"In order to establish that Goya should be held responsible for the economic losses she suffered as a result of quitting, Marrero had to show that her working conditions were so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign." (internal citations and quotations omitted).
Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 165 (3rd Cir. 2001)	"We employ an objective test to determine whether an employee can recover on a claim of constructive discharge. Specifically, a court must determine whether a reasonable jury could find that the employer permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign." (internal citations and quotations omitted).
Wolf v. Northwest Indiana Symphony Society, 250 F.3d 1136, 1142 (7th Cir. 2001)	"An employee can assert a claim of constructive discharge when he is forced resign because his

	working conditions, from the standpoint of the reasonable employee, have become unbearable."
Campos v. City of Blue Springs, 289 F.3d 546, 550 (8th Cir. 2002)	"To prove constructive discharge, Campos was required to establish that the City, and Petrillo in particular, deliberately made or allowed her working conditions to become so intolerable that she had no other choice but to resign, or at least should have reasonably foreseen Campos' resignation as a consequence of the unlawful working conditions that were created.... Furthermore, Campos was required to show that a reasonable person, from an objective viewpoint, would find the working conditions intolerable." (internal quotations and citations omitted).
Garrett v. Hewlett Packard Co., 305 F.3d 1210, 1221 (10th Cir. 2002)	"Constructive discharge occurs when the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." (internal citations and quotations omitted).

The minor differences in formulating the test do not alter that, in substance, each Circuit applies the same standard ultimately established in *Suders* that proof of constructive discharge requires a showing that working

conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign. Saville cannot create a Circuit split where none exists.

In his second question presented, Saville also asserts that *Burlington No. & Santa Fe RR Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), has created confusion as to the standard for proof of constructive discharge announced in *Suders*. Essentially, he invites this Court, in a FLSA case, to overturn its Title VII decision in *Suders*, based on its Title VII decision in *Burlington*.

This Court, however, had the opportunity to consider the continuing validity of *Suders* in *Burlington* and left it as good law and continuing precedent. The Court's decision in this regard is not surprising given that *Burlington* and *Suders* are easily reconciled. *Burlington* held that to support a Title VII retaliation claim, the plaintiff must allege the employer engaged in actions that a reasonable employee would have found materially adverse. 126 S. Ct. at 2415, 165 L. Ed. 2d at 359-60 (citing *Suders*). An example of such actions are those that would lead a reasonable employee to determine that he or she had no choice but to resign, *i.e.*, constructive discharge, as defined in *Suders*. Where those employer actions do not lead to the employee's resignation, they are evaluated under *Burlington*. Where those employer actions do lead to the employee's resignation, they are evaluated under *Suders*.[2]

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[2] Saville also argues that this Court's decision in *Suders* conflicts with this Court's earlier decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), a hostile work environment case under Title VII, and that the present FLSA case is the appropriate vehicle to resolve the conflict. Petition, at 18-19. In *Suders*, however, the Court cited *Harris*

(Continued on following page)

Saville's final argument under his second presented question is that the standard for constructive discharge established by this Court "seems to be very difficult to satisfy" and, on that basis, should be reconsidered. Petition, at 20. Saville's lament that "employees making claims of constructive discharge rarely succeed" does not give rise to a need for this Court's review nor does Saville's contention that the legal standard for such claims, which this Court has repeatedly re-affirmed, may have been irregularly applied by lower courts in vastly different factual contexts. *Id.* (citing *Agnew v. BASF Corp.*, 286 F.3d 307 (6th Cir. 2002) and *Garrett*, *supra*).

2. The Supreme Court has Already Decided Saville's First Question Presented Regarding Whether Constructive Discharge would Constitute Materially Adverse Employment Action.

In his first question presented, Saville states that this Court should decide that the concept of "materially adverse employment actions" includes constructive discharge or what Saville calls "forced early retirement" and characterizes this as an "open question." Petition, at 15 & 17. Yet, the Petition itself discusses *Suders*, the very case in which this Court decided this issue. There is no "open question."

As discussed in the Petition, at 18-19, in *Suders*, this Court held:

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with approval and reconciled it with the holding in *Suders*. 542 U.S. at 133-34. The Court found no conflict between these decisions then and should not find one now given the Court's citation with approval of both *Suders* and *Harris* in *Burlington*. 126 S. Ct. at 2415, 165 L. Ed. 2d at 360.

> Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. [citation omitted]. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?

542 U.S. at 141. No one – not this Court, the Tenth Circuit, the other Circuit courts, IBM, or Saville – disagrees that constructive discharge or "forced early retirement" constitutes materially adverse employment action on which a retaliation claim under the FLSA may be predicated. Indeed, the Tenth Circuit held "Saville's retirement from IBM would qualify as an adverse action only if IBM deliberately made or allowed Saville's working conditions to become so intolerable that he had no other choice but to retire." App. 5. As discussed above, the Petition itself recognizes that other Circuits are in agreement on this legal issue. Petition, at 19 (citing authorities from the First, Third, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeals).

In connection with his first presented question, Saville also contends that this Court's decision in *Burlington* applies here and somehow needs to be harmonized with *Suders*. Saville is wrong on both accounts. In *Burlington*, this Court undertook a textual analysis of Title VII's anti-retaliation provision to resolve a clearly defined disagreement among the Circuits. 126 S. Ct. at 2410-11, 165 L. Ed. 2d at 354-355. Here, Saville alleged no claim under Title VII.

Saville argues, however, without the benefit of any analysis, that this Court's ruling in *Burlington* "presumably" applies "to claims of discrimination or retaliation under all federal workplace statutes [including the FLSA] which encourage protected activity and prohibit employer retaliation against employees engaging in protected activity." Petition, at 16. This Court has not so held and IBM has located no decision from a Circuit court extending the holding in *Burlington* to the FLSA. Absent any consideration by the Circuit courts of this issue, IBM respectfully contends that it would be premature for this Court to decide the issue, particularly in a case like the present one where the issue regarding constructive discharge is not dispositive of the case, as discussed in section B, below.

Further, there is no conflict between the decisions in *Suders* and *Burlington*. Indeed, the *Suders* decision is cited with approval in *Burlington, see* 126 S. Ct. at 2413, 2415, 165 L. Ed. 2d at 357, 360, and Justice Ginsburg, who delivered the opinion of the Court in *Suders*, joined the opinion of the Court in *Burlington*. The *Burlington* decision does not overturn the decision in *Suders* or conflict with it. Consistent with both decisions, a plaintiff can seek redress under the anti-retaliation provisions of Title VII on the basis of a constructive discharge as it remains an employer action "materially adverse to a reasonable employee." *Burlington*, 126 S. Ct. at 2409, 165 L. Ed. 2d at 353.

3. The Third Question Presented in the Petition Seeks Clarification Where None is Needed.

In his third presented question, Saville again seeks to extend the holding in *Burlington* to this FLSA case and to

have this Court "clarify what the heavily subjective concept of 'context matters' means in applying an objective standard." Petition, at 23. No issue warranting this Court's review is presented here. As Saville himself recognizes in his Petition:

> No doubt because of the fact intensive nature of the inquiry as to whether any given adverse employment action constitutes a materially adverse employment action, the Supreme Court did not attempt to list or describe all adverse actions which could be deemed to be materially adverse employment actions.

Petition, at 17. Similarly, there is no need for this Court to clarify each and every individualized circumstance that would swing the balance in favor or not in favor of finding that "working conditions [had] become so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Suders*, 542 U.S. at 141. The district courts can properly make this determination without additional guidance.

4. Saville's Disagreement with the Tenth Circuit's Weighing of the Evidence Does not Present an Issue Warranting this Court's Review.

In his fourth presented question, Saville merely argues that his Petition should be granted because the Tenth Circuit "did not give sufficient weight to the context" of his employment with IBM, should have "focused more carefully" on this context, and given it "appropriate weight." Petition, at 25. As the Supreme Court rules provide, review by this Court is "rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." Sup. Ct. R. 10. Saville's asserted error falls squarely within the ambit of this rule.

Further, it is clear from the Tenth Circuit's opinion that it did consider context and did carefully examine Saville's factual showing in opposition to summary judgment. Saville asked the Tenth Court and the District Court to consider one alleged adverse employment action – whether his retirement was voluntary or amounted to a constructive discharge. Aplee. Supp. App. at 57; App. 1-2, 5. The Tenth Circuit held that Saville's claim that his retirement from IBM was tantamount to a constructive discharge would, consistent with *Suders*, "depend upon whether a reasonable person would view the conditions at IBM as intolerable, not upon Saville's subjective view of those conditions." App. 5.

The Tenth Circuit considered Saville's tenure at IBM as well as Saville's job performance deficiencies, admitted attitude problems, insubordination, and poor treatment of customers that led IBM in 1998 to give Saville the option of being placed on a 30-day performance plan or retiring with severance benefits. App. 2-3. The Tenth Circuit considered the criteria under which he would be judged under the performance plan, as well as Saville's own successful experience as a manager with the placement of IBM employees on performance plans. *Id.* at 3, 7. Based on the "totality of the[se] circumstances," the Tenth Circuit found that "Saville's retirement was voluntary" and his FLSA claim failed. *Id.* at 7. Saville's disagreement with how the Tenth Circuit considered these undisputed facts in the light of the correct legal standard for FLSA retaliation claims does not present an issue warranting this Court's review.

B. The Procedural Context of this Case Makes it Ill-Suited for this Court's Review.

Not only has Saville failed to raise any issue meriting this Court's review, but his case is particularly ill-suited for addressing any of the issues identified in the Petition, because they are not dispositive of the case. As set forth in the Statement of the Case, the District Court ruled against Saville on summary judgment on all *three* elements of his *prima facie* case of FLSA retaliation and then further considered and ruled against Saville on the issue of pretext. Because the Tenth Circuit agreed that Saville had not established the adverse employment action element of his *prima facie* case, it was able to affirm the District Court's judgment without considering either of the other two elements of Saville's *prima facie* case or the issue of pretext. Consequently, were this Court to find that the Tenth Circuit's decision was in error, the Tenth Circuit could, on remand, affirm the District Court on any of the other three bases for its summary judgment ruling. As such, this case presents a particularly poor vehicle for this Court to consider the issues raised in Saville's Petition.

C. The Tenth Circuit's Unanimous Decision is Unpublished and Without Precedential Authority.

As Saville notes in his Petition, the Tenth Circuit did not select its Order and Judgment in this case for publication. As the footnote on the first page of the Tenth Circuit's Order and Judgment states: "This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of order and judgments. . . ." App. 1. Consequently, the Tenth Circuit's

decision in this action did not establish precedent within the Circuit and, therefore, has no broad impact. This fact weighs against granting Saville's Petition. Further, the Order and Judgment of the Tenth Circuit in this case was unanimous. There is no indication that the case presented any issues that the panel of Circuit Judges found vexing or troublesome.

II. Conclusion.

For all the foregoing reasons, IBM opposes Saville's Petition and respectfully requests that the Court deny it.

Respectfully submitted,

MARTIN D. LITT, ESQUIRE
(Counsel of Record)
SVEN C. COLLINS, ESQUIRE

Attorneys for Respondent International Business Machines Corporation

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